

*Pickens County Branch of the NAACP, et al v. School District of Pickens County.*  
Civil Action No. 8:23-cv-01736-BHH

# Exhibit A

**to School District of Pickens County's Motion to Dismiss Plaintiffs' Complaint**

**Expert Declaration of Professor David E. Bernstein**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
ANDERSON DIVISION**

Pickens County Branch of the NAACP;

Rebecca Turner and Brandon Turner, on behalf of  
minor children J.T. and G.T.;

Susanna Ashton and Peter Laurence on behalf of  
minor children H.L. and C.L.;

Reba Kruse and Derrick Kruse on behalf of minor  
children S.K. and R.K.,

Plaintiffs,

v.

School District of Pickens County,

Defendant.

Case No. 8:23-cv-01736-BHH

**EXPERT DECLARATION OF PROFESSOR DAVID E. BERNSTEIN**

I, **DAVID E. BERNSTEIN**, declare pursuant to 28 U.S.C. § 1746 as follows:

1. My name is David E. Bernstein. I have been retained to render opinions regarding the historical accuracy of the factual and historical account contained in *Stamped: Racism, Antiracism, and You* (“*Stamped*”), by Ibram X. Kendi and Jason Reynolds (“the authors”). My opinions are based on my knowledge, education, training, and experience, and the records and materials I have reviewed regarding this matter.
2. I am a Distinguished University Professor at the Antonin Scalia Law School at George Mason University. In addition, I serve as the Executive Director of the Law School’s Center for Liberty & Law. I have during my career also served as a visiting professor at the William and Mary School of Law, the Brooklyn School of Law, the University of Michigan Law School, Georgetown University Law Center, and Columbia Law School.
3. A true and correct copy of my curriculum vitae is attached as Exhibit A.
4. I received my B.A., summa cum laude, in history from Brandeis University in 1988. I received my law degree from Yale Law School in 1991. While in law school, I served

as a Senior Editor of the Yale Law Journal, as a John M. Olin Fellow in Law, Economics, and Public Policy, and as a Lambe Fellow of the Institute for Humane Studies.

5. During my professional career in academia, I have written and published many books, book chapters, and articles on topics relating to the history of race in America. These published works include the following:
  - a. *Classified: The Untold Story of Racial Classification in America* (Post Hill Press 2022)
  - b. *Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal* (Duke University Press 2001)
  - c. Judicial Power and Civil Rights Reconsidered, 114 *Yale L.J.* 593 (2004) (review essay of Michael Klarman, *From Jim Crow to Civil Rights*) (with Ilya Somin)
  - d. The Modern American Law of Race, 94 *S. Calif. L. Rev.* 171 (2021)
  - e. Railroad Unions, Racism, and Labor Regulations, 5 *Independent Rev.* 237 (2000)
  - f. Licensing Laws: A Historical Example of the Use of Government Regulatory Power against African Americans, 30 *San Diego L. Rev.* 89 (1994)
  - g. Roots of the ‘Underclass’: The Decline of Laissez-faire Jurisprudence and the Rise of Racist Labor Legislation, 43 *Am. U. L. Rev.* 85 (1993)
  - h. Prevailing Wage Legislation and the Continuing Significance of Race, 44 *Notre Dame J. Leg.* 158 (2018)
  - i. Review of Richard C. Cortner, Civil Rights and Public Accommodations: The Heart of Atlanta Motel and McClung Cases, *Ideas on Liberty*, Nov. 2002

A complete list of my writing, including other publications relevant to the topic described above, can be found in my CV, attached hereto as Exhibit A.

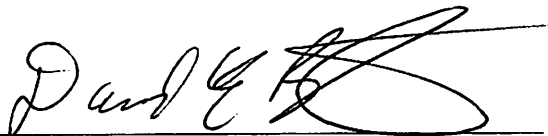
6. In 2019, I became aware of controversy related to *Stamped* and its use in public schools. Out of professional interest and personal curiosity, I read and analyzed the book and found a number of errors and distortions. The conclusions I formed regarding *Stamped* and the historical veracity of its account were formed on my own. A non-exhaustive list of such factual errors and distortions includes:
  - a. In the Preface to *Stamped*, coauthor Kendi divides those involved in the debate over the status of black Americans into three groups, segregationists, assimilationists, and antiracists. Both segregationists and assimilationists have “racist positions” and “think Black people are to blame for racial inequity.” The authors later identify as “assimilationists” such prominent civil rights figures as Frederick Douglass, Booker T. Washington, W.E.B. DuBois, and Martin Luther

King, Jr. In other words, each of these individuals are depicted as having and promoting racist ideas. Calling Douglass' or King's ideas "racist" is an outrageous distortion in support of Kendi's idiosyncratic and unjustified belief that anyone who doesn't share his self-styled antiracist philosophy is racist. (And it bears noting the irony that several modern figures whom Kendi praises as "antiracists" have or had a history of antisemitism.)

- b. On pages 172-173, *Stamped* suggests that not only was the 1964 Civil Rights Act ineffectual in advancing the rights of black Americans, the Act also caused "a racist backlash." Angela Davis and Malcolm X were right in opposing the Act, the authors claim, because the law not going to be enforced by the racist white establishment. In fact, there was no racist backlash. Racism continued a long-term decline. Acceptance of interracial marriage, for example, rose from 4% in 1958 to 94% in 2021. Nor was there a failure to enforce the Act. Southern businesses went from mainly segregated in 1964 to almost all integrated by 1970. The new Equal Employment Opportunity Commission aggressively enforced the provisions of the Act banning discrimination in employment.
- c. On page 174, *Stamped* states that 1964 presidential candidate Barry Goldwater opposed federal spending because it was going to help black people for the first time. ("This racist epiphany hit Goldwater once Black people were receiving government assistance, too.") In fact, before he ran for president, Goldwater (a) was a consistent opponent of increased federal spending dating back to the 1940s; and (b) a strong supporter of racial integration (including in his family's own businesses) and of the local NAACP and National Urban League chapters. The notion that Goldwater suddenly had a "racist epiphany" about federal spending is simply invented out of whole cloth by the authors.
- d. On page 206, the authors assert that "(President Ronald) Reagan's economic policies caused unemployment to skyrocket." In fact, after one recession early in Reagan's presidency, generally attributed to the Federal Reserve's high interest rate policy, unemployment steadily declined throughout Reagan's tenure. When Reagan left office in January 1989, the unemployment rate was approximately 5.3%, down from approximately 7.5% when he became president.
- e. The authors allege that *Washington Post* columnist Charles Krauthammer invented the term "crack baby" in 1989. "Krauthammer and racists," they write, "had basically figured out how to create a generation of black criminals in their minds." Krauthammer first used the phrase "crack baby" in July 1989. The *New York Times* had used it in an editorial several months earlier, apparently utilizing a phrase already in use in medical and public health circles. Editorial, Mothers, Babies, and Crack, N.Y. Times, May 14, 1989. Thus, as even a cursory Google search would have revealed to the authors, Krauthammer did not invent the term. And contrary to the authors' suggestion that the phrase was invented by Krauthammer to demonize black people, the Times' editorial never mentions race, explicitly opposed punishing drug-addicted pregnant women, and called for large-scale investments in programs to help such women and their offspring.

- f. The main hero of *Stamped* is Angela Davis. Davis's personal history and significance are consistently distorted by the authors to support their narrative. For example, the authors write that Davis left the Communist Party, USA in 1991 because it was not acknowledging racism, sexism, and elitism. In fact, as a tool of the Soviet Union, the Party basically collapsed with the fall of Soviet Communism. On page 225, the authors state that in 1995 Davis was "still a threat." In fact, Davis was always a fringe figure in American politics, except in far-left activist circles. Nevertheless, the authors consistently write about her as if she was and is a major force.
7. These and other examples of historical errors, omissions, and distortions in *Stamped* lead me to conclude that the book's narrative regarding American history is inaccurate, unreliable, and presents an extremely distorted view of the history it recounts. In the case of many of the errors, even rudimentary fact-checking would have caught them.
8. I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 20 day of July 2023.



David E. Bernstein

# Exhibit A

to the Declaration of Professor David E. Bernstein

*Curriculum Vitae*

**DAVID E. BERNSTEIN**

Antonin Scalia Law School  
George Mason University  
3301 Fairfax Drive  
Arlington, Virginia 22201  
Office Phone: 703/993-8089  
E-Mail: dbernste@gmu.edu

**EMPLOYMENT**

**Antonin Scalia Law School, George Mason University**

University Professor, 2017-present

Executive Director, Liberty & Law Center, 2017-present (have raised over \$3 million in that role)

George Mason University Foundation Professor, August 2010—2017

Professor, August 2002-August 2010

Associate Professor, September 1998-August 2002

Assistant Professor, August 1995-August 1998

**Hebrew University**

Visiting Professor, December 2022

**University of Turin**

Visiting Professor, Summer 2021 (virtual due to Covid travel restrictions)

**William and Mary Law School**

Visiting Professor, Spring 2014 (short course)

**Brooklyn Law School**

Visiting Professor, Fall 2006

**University of Michigan Law School**

Visiting Professor, Fall 2005-Spring 2006

**Georgetown University Law Center**

Visiting Professor, Spring 2003

**John M. Olin Foundation**

Junior Faculty Fellow, 1997-98 (paid research leave awarded to five humanities scholars nationwide)

**Columbia Law School**

Mellon Foundation Fellow, Julius Silver Program in Law, Science, and Technology, 1994-95

**Crowell & Moring**

Associate, 1992-94

**Honorable David A. Nelson**

Sixth Circuit U.S. Court of Appeals

Law Clerk, 1991-92

**SELECTED PUBLICATIONS**

**Books**

*Classified: The Untold Story of Racial Classification in America* (Post Hill Press 2022)

*Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (University of Chicago Press 2011; paperback 2012)

*The New Wigmore: Expert Evidence* (Aspen Law and Business 2004 and annual supplements; 3d edition 2020) (with Kaye and Mnookin)

*You Can't Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws* (Cato Institute 2003; paperback 2004)

*Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal* (Duke University Press 2001)

**Articles**

Revisiting Justice George Sutherland, the Nineteenth Amendment and Equal Rights for Women, 20 *Geo. J. L. & Pub. Pol'y* 140 (2022)

The Modern American Law of Race, 94 *S. Cal. L. Rev.* 171 (2021)

“Administrative Constitutionalism:” Considering the Role of Agency Decisionmaking in American Constitutional Development, 38 *Social Phil. & Pol'y* 109 (2021)

Class Legislation, Fundamental Rights, and the Origins of *Lochner* and Liberty of Contract, 26 *George Mason L. Rev.* 1023 (2020)

Antidiscrimination Laws and the Administrative State: A Skeptic's Look at Administrative Constitutionalism, 94 *Notre Dame L. Rev.* 1381 (2019)

Constitutional Hardball Yes, Asymmetric Not So Much, 118 *Colum. L. Rev. Online* 207 (2018)

The Due Process Right to Earn a Living: A Brighter Future Ahead?, 126 *Yale L.J. F.* 287 (2016)

“Substantive” Due Process: It's Complicated, 95 *Tex. L. Rev. See Also* 1 (2016)



Defending *Daubert*: It's Time to Amend Federal Rule of Evidence 702, 57 *Wm. & Mary L. Rev.* 1 (2015) (with Eric Lasker)

What to do about Federal Agency Science: Some Doubts about Regulatory *Daubert*, 22 *George Mason L. Rev.* 549 (2015)

The Misbegotten Judicial Resistance to the *Daubert* Revolution, 89 *Notre Dame L. Rev.* 27 (2014)

The Mainstreaming of Libertarian Constitutional Thought, 76 *L. & Contemp. Probs.* 43 (2014) (with Ilya Somin)

"Reverse *Carolene Products*," the End of the Second Reconstruction, and other Thoughts on *Schuette v. Coalition to Defend Affirmative Action*, 2014 *Cato Sup. Ct. Rev.* 261

From Progressivism to Modern Liberalism in Constitutional Law: Louis D. Brandeis as a Transitional Figure, 89 *Notre Dame L. Rev.* 2029 (2014)

The Conservative Origins of Strict Scrutiny, 19 *Geo. Mason L. Rev.* 861 (2012)

Excluding Unfit workers: Social Control Versus Social Justice in the Age of Economic Reform, 72 *L. & Contemp. Probs.* 177 (2009) (with Thomas C. Leonard)

Revisiting *Yick Wo v. Hopkins*, 2008 *Ill. L. Rev.* 1393

Getting to Causation in Toxic Tort Cases, 74 *Brooklyn L. Rev.* 51 (2008)

Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the *Daubert* Revolution, 93 *Iowa L. Rev.* 451 (2008)

Learning the Wrong Lessons from "An American Tragedy," 104 *Mich. L. Rev.* 1961 (2006)

The Red Menace Revisited, 100 *Nw. U. L. Rev.* 1295 (2006) (review essay of Martin Redish, *The Logic of Persecution: Free Expression and The McCarthy Era*)

*Lochner v. New York*: A Centennial Retrospective, 83 *Wash. U.L.Q.* 1469 (2005)

*Bolling*, Equal Protection, Due Process, and *Lochner*phobia, 83 *Geo. L.J.* 1253 (2005)

Judicial Power and Civil Rights Reconsidered, 114 *Yale L.J.* 593 (2004) (review essay of Michael Klarman, *From Jim Crow to Civil Rights*) (with Ilya Somin)

*Lochner's* Feminist Legacy, 101 *Mich. L. Rev.* 2176 (2003) (review essay of Julie Novkov, *Constituting Workers, Protecting Women*)

*Lochner's* Legacy's Legacy, 82 *Tex. L. Rev.* 1 (2003)

*Lochner* Era Revisionism, Revised: *Lochner* and the Rise of Fundamental Rights Constitutionalism, 92 *Geo. L.J.* 1 (2003)

The Breast Implant Fiasco, 87 *Cal. L. Rev.* 457 (1999)

*Lochner*, Parity, and the Chinese Laundry Cases, 41 *Wm. & Mary L. Rev.* 211 (1999)

Philip Sober Restraining Philip Drunk: *Buchanan v. Warley* in Historical Perspective, 51 *Vand. L. Rev.* 799 (1998)

The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African Americans, 74 *Tex. L. Rev.* 781 (1998)

Junk Science in the United States and the Commonwealth, 21 *Yale J. Int'l L.* 123 (1996)

The Admissibility of Scientific Evidence after *Daubert v. Merrell Dow Pharmaceuticals*, 15 *Cardozo L. Rev.* 2139 (1994)

## **ADDITIONAL PUBLICATIONS**

### **Books, Articles, Book Chapters, & Think Tank Studies**

The Perils of Administrative Constitutionalism: An American Perspective, 2 *J. Commonwealth L.* 138 (2021)

The Right to Armed Self-Defense in the Light of Law Enforcement Abdication, 19 *Geo. J. L. & Pub. Pol'y* 177 (2021)

Two Decades Ago, The FDA and NIH Mandated the Use of Race to Categorize Subjects and Report Results in Medical and Scientific Research They Oversee. It was a Huge Mistake, *Yale Journal on Regulation: Notice and Comment* (July 2020), <https://tinyurl.com/4a5vjvub>

Prevailing Wage Legislation and the Continuing Significance of Race, 44 *Notre Dame J. Leg.* 158 (2018)

Reflections on the 100th Anniversary of *Buchanan v. Warley*: Recent Revisionist History and Unanswered Questions, 48 *Cumberland L. Rev.* 101 (2018)

The Boundaries of Anti-Discrimination Law, in Todd Henderson, ed., *The Future of Classical Liberalism* (Cambridge U. Press 2018)

The Abuse of Executive Power: Getting Beyond the Streetlight Effect, 11 *Fla. Int'l L. Rev.* 289 (2016) (based on keynote symposium address)

Restoring Freedom of Contract between Doctor and Patient in Medicare Part B, Mercatus Center, Sept. 2015

*Lawless: The Obama Administration's Unprecedented Assault on the Constitution and the Rule of Law* (Encounter 2015)

*A Conspiracy against Obamacare: The Volokh Conspiracy and the Health Care Case* (Palgrave MacMillan 2013) (with Adler, Barnett, Kerr, Kopel, and Somin)

*Schuette v. Coalition to Defend Affirmative Action* and the Failed Attempt to Square a Circle, 89 *NYU J. Law & Liberty* 210 (2013)

The Progressive Origins of Conservative Hostility to *Lochner v. New York*, in Jonathan O'Neill & Joseph Postell, eds., *Toward an American Conservatism: Constitutional Conservatism during the Progressive Era* (Palgrave MacMillan 2013)

Oyez, Oyez, Oyez! Curious Cases at the Supreme Court, *Phi Kappa Phi Forum*, Fall 2013, at 18  
Brandeis Brief Myths, 15 *Green Bag* 2d 9 (2011)

*Lochner* and Constitutional Continuity, 36 *J. Sup. Ct. Hist.* 116 (2011)

The Unfinished *Daubert* Revolution, *Engage: Journal of the Federalist Society Practice Groups*, Feb. 2009, at 35

Thoughts on *Hodges v. United States*: Comment on Karlan, 82 *B.U. L. Rev.* 811 (2005)

*Lochner v. New York*: Barrier to the Growth of the Regulatory State, in Michael Dorf, ed., *Constitutional Law Stories* (Foundation Press 2004)

The Right to Petition, in *The Heritage Guide to the Constitution* (David Forte, ed. 2004 and 2d ed. 2012)

Expressive Association after *Dale*, 21 *Social Phil. & Pol'y* 195 (2004), also published in Ellen Frankel Paul, ed., *Freedom of Speech* (Cambridge Univ. Press 2004)

The *Daubert* Trilogy in the States, 44 *Jurimetrics J.* 351 (Spring 2004) (with Jeffrey Jackson)

Keeping Junk Science Out of the Asbestos Litigation, 31 *Pepp. L. Rev.* 11 (2003)

Improving the Qualifications of Experts in Medical Malpractice Cases, 1 *Law, Probability & Risk* (2002)

*Frye, Frye*, Again: The Past, Present, and Future of the General Acceptance Test, 41 *Jurimetrics J.* 385 (2001)

Antidiscrimination Laws and the First Amendment, 66 *Mo. L. Rev.* 83 (2001)

The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes, 9 *Wm. & Mary Bill Rts. L.J.* 619 (2001)

Railroad Unions, Racism, and Labor Regulations, 5 *Independent Rev.* 237 (2000)

*Lochner* vs. *Plessy*: The *Berea College* Case, 25 *J. Sup. Ct. Hist.* 93 (2000)

Assessing the Social and Legal Consequences of Scientific Ambiguity, in *Cutting Green Tape: Tort Law, Bureaucracy and the Environment* (Meiners & Stroup eds., Independent Institute 2000) (with Foster and Huber)

Two Asian Laundry Cases, 23 *J. Sup. Ct. Hist.* 95 (1999)

Sex Discrimination Laws Versus Civil Liberties, 1999 *U. Chi. Leg. Forum* 133 (1999)

The Abuse of Opening Statements and Closing Arguments in Civil Litigation, *Court Rev.: Journal of the American Judges' Association*, Fall/Winter 1997, at 16; revised version published as Manhattan Institute Civil Justice Memo No. 38 (Aug. 1999)

'Non-Scientific' Expert Witnesses: What Degree of Judicial Scrutiny Should They Face?, Washington Legal Foundation, Oct. 1998

The Shameful, Wasteful History of New York's Prevailing Wage Law, 7 *George Mason Civ. Rts. L.J.* 1 (1997)

Lessons from the American Experience, in *Law and Markets* (Robson & Lippert eds. 1997)

Loser-Pays: Where Next? 55 *Md. L. Rev.* 1161 (1996) (with Walter Olson)

Leading Expert Evidence: A U.S. Perspective, 3 *James Cook U. L. Rev.* 170 (1996)

Procedural Tort Reform: Lessons from Other Nations, *Regulation*, No. 1, 1996, at 67

The Science of Forensic Psychiatry and Psychology, 2 *Psychology, Psychiatry & L.* 75 (1995)

Legal Reform: Learning from the Commonwealth, *Manhattan Institute Civil Justice Memo* No. 25 (May 1996)

Breast Implants: A Study in Phantom Risks, *Manhattan Institute Research Memorandum* No. 5 (April 1995)

The Davis-Bacon Act: Vestige of Jim Crow, 13 *Nat'l Black L.J.* 276 (1994)

Licensing Laws: A Historical Example of the Use of Government Regulatory Power against African Americans, 30 *San Diego L. Rev.* 89 (1994)

The Admissibility of Scientific Evidence after *Daubert v. Merrell Dow Pharmaceuticals*, 15 *Cardozo L. Rev.* 2139 (1994)

Scientific Evidence after *Daubert v. Merrell Dow Pharmaceuticals*, *Health & Environment Digest*, April 1994, at 3

Science and the Toxic Tort: New Guidelines for the Admissibility of Scientific Evidence, 261 *Science* 1509 (1993) (with Foster and Huber)

It's Time to Reform New York's Prevailing Wage Law, Empire Foundation for Public Policy Research (September 1993) (think tank study)

Scientific Evidence in the Courtroom: Admissibility and Statistical Significance after *Daubert*, Washington Legal Foundation (1993) (with Robert Charrow)

*Daubert* Plaintiffs Won Battle, Lost War, *Product Safety and Liability Rep.* (BNA) *Special Report: Daubert: What Next?*, Summer/Fall 1993, at 16 (co-author with Peter Huber) (article also appeared in *Shepard's Scientific and Expert Evidence Quarterly*)

Co-author of several chapters and coeditor of *Phantom Risk: Scientific Inference and the Law* (MIT Press 1993)

Roots of the 'Underclass': The Decline of Laissez-faire Jurisprudence and the Rise of Racist Labor Legislation, 43 *Am. U. L. Rev.* 85 (1993)

The Davis Bacon-Act: Let's Put an End to Jim Crow, Cato Institute (Jan.1993)

Equal Protection for Economic Liberty: Is the Court Ready?, Cato Institute (October 1992)

From Pesthouses to AIDS Clinics: Neighbors' Irrational Fears of Treatment Centers for Contagious Diseases, 23 *Colum. Hum. Rts. L. Rev.* 1 (1990)

Out of the *Fryeing* Pan and into the Fire: The Expert Witness Problem in Toxic Tort Litigation, 10 *Rev. Litig.* 117 (1990)

Note, The Supreme Court and 'Civil Rights,' 1886-1908, 100 *Yale L.J.* 725 (1990)

Note, A Contractual Solution to the Contraceptive Crisis, 8 *Yale L. & Pol'y Rev.* 146 (1989)

### **Shorter Publications**

Unchecking the Box, *Brandeis Magazine*, Winter 2023

Diversity by Diktat: An Obscure 1977 OMB Memo Forms the Basis for Today's Affirmative-Action Programs, SCOTUSblog, Oct. 6, 2022

Review of Adam Winkler, *We the Corporations*, *Claremont Review*, Feb. 2019

How Anti-Discrimination Became a Religion, and what it Means for Judaism, *Mosaic*, Aug. 8, 2016, <http://mosaicmagazine.com/response/2016/08/how-anti-discrimination-became-a-religion-and-what-it-means-for-judaism>

The Courts and Tradition: A Begrudging Respect, *Liberty Law Forum*, Aug. 8, 2016, <http://www.libertylawsite.org/liberty-forum/the-courts-and-tradition-a-begrudging-respect>

Review of Sophia Lee, *The Workplace Constitution: From the New Deal to the New Right*, *Reason*, Feb. 2016, at 55

The Racism behind Prevailing Wage, *N.Y. Daily News*, Jan. 25, 2016 (op-ed)

Attacks on Religious Freedom: Coming Soon to a Church Near You, *Daily Signal*, Nov. 24, 2015 (op-ed)

Review of Phillip Hamburger, *Is Administrative Law Unlawful?*, 33 *Law & History. Rev.* 759 (2015)

Reassessing *Lochner v. New York*, in Paul J. Larkin, ed., *Economic Liberty and the Constitution: An Introduction*, Heritage Foundation Special Report No. 157, Oct. 1, 2014.

Review of Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Times*, *Reason.com*, May 21, 2013

Online Fisher symposium: Affirmative Action after Fisher – Back to the Future?, *SCOTUSblog* Sept. 6, 2012.

Is this 1936?, *Scotusblog*, June 29, 2012, <http://www.scotusblog.com/2012/06/is-this-1936/>

The Role of *Lochner* in the Health Care Litigation, *Jurist*, March 2012, <http://jurist.org/forum/2012/03/david-bernstein-lochner.php> (op-ed)

*Lochner v. New York*, the Judiciary, and Legitimate Constitutionalism, *Claremont Review of Books* (Dec. 2011)

Response to George W. Liebmann, 21 *L. & Pol. Book Rev.* 441 (2011)

Oliver Wendell Breyer, *Newark Star-Ledger*, July 12, 2011 (with Josh Blackman) (op-ed)

Context Matters: A Better Libertarian Approach to Antidiscrimination Laws, *Cato Unbound*, June 16, 2010

The Neglected Case of *Buchanan v. Warley*, *Scotusblog*, Feb. 10, 2010

Rufus Peckham, in *The Yale Biographical Dictionary of American Law* (Roger K. Newman ed. 2009)

*Roberts v. Jaycees*, in *Encyclopedia of the First Amendment* (John R. Vile et al. eds. 2008)

Right to Petition, in *Encyclopedia of the First Amendment* (John R. Vile et al. eds. 2008)

Liberty of Contract, in *Encyclopedia of the Supreme Court of the United States* (David S. Tanenhaus ed. 2008)

*Munn v. Illinois*, in *Encyclopedia of the Supreme Court of the United States* (David S. Tanenhaus ed. 2008)

*Allgeyer v. Louisiana*, in *Encyclopedia of the Supreme Court of the United States* (David S. Tanenhaus ed. 2008)

*Buchanan v. Warley*, in *The New Encyclopedia of Southern Culture* (Charles Reagan Wilson ed. 2008)

Emigrant Agent Laws, in *The New Encyclopedia of Southern Culture* (Charles Reagan Wilson ed. 2008)

Review of Paul Moreno, *Blacks and Organized Labor: A New History*, *Independent Review* (Dec. 2006)

Liberty of Contract, in the *Encyclopedia of American Civil Liberties* (Paul Finkelman ed. 2006)

The Right to Petition, in the *Encyclopedia of American Civil Liberties* (Paul Finkelman ed. 2006)

Quackspertise, *Wall Street J.*, Sept. 30, 2006 (op-ed)

Affirmative Blackmail, *Wall St. J.*, Feb. 11, 2006 (op-ed)

The Right to Petition, in *The Heritage Guide to the Constitution* (2005)

Review of Ken Kersch, *Constructing Civil Liberties*, *American Historical Rev.*, Oct. 2005

Peg-Leg Williams, in *One Hundred Americans Making Constitutional History* (Melvin Urofsky, ed. 2004)

Review of Barbara Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920*, *American J. Legal History* (2003)

Review of Michael J. Phillips, *The Lochner Court Myth and Reality: Substantive Due Process from the 1890s to the 1930s*, *Law & History Rev.* (Winter 2003)

Let Private Colleges Practice Affirmative Action, *Cato Daily J.* (and syndicated newspapers), June 23, 2003 (op-ed)

Free Speech? Not on Campus, *Orange County Register*, Oct. 21, 2003 (op-ed)

Solomon Amendment Fight, *Harv. Law Rec.*, Nov. 20, 2003 (op-ed)

Review of Richard C. Cortner, *Civil Rights and Public Accommodations: The Heart of Atlanta dMotel and McClung Cases*, *Ideas on Liberty*, Nov. 2002, at 58



Junk Science in the Asbestos Litigation, *Mealey's Asbestos Reporter* (Aug. 2002)

Junk Expert Testimony: The Battle Rages On, *Engage: The Journal of the Federalist Society's Practice Groups*, 2002, at 112

Tort Reform Lessons, *Aetna 2001 Annual Report* (2002)

Disinterested in *Daubert*: State Courts Lag Behind in Opposing “Junk” Science, Washington Legal Foundation, Legal Opinion Letter (June 21, 2002)

Casey Martin Ruling is Par for the Course, *Wall St. J.*, May 30, 2001 (op-ed)

The ACLU Has Lost its Way, *Cincinnati Enquirer*, May 16, 2000, at 8 (also published in other newspapers) (op-ed)

Anti-Bias Laws vs. Civil Liberties, *Wash. Times*, Aug. 15, 1999 (op-ed)

Review of Julie Novkov, *Constituting Workers, Protecting Women: Gender, Law and Labor in the Progressive Era and New Deal Years* (Eh.net—economic historians' listserv)

Comment on *Kumho Tire*, *AALS Section on Evidence Newsletter*, Spring 1999, at 3

Letter to the Editor, Judge was Correct to Exclude Testimony, *Legal Times*, April 12, 1999, at 23  
Comment on Gary Edmond and David Mercer, The Politics of Jury Competence, in *Technology and Public Participation* (Xlibris 1999)

A Breast Bone of Contention, *Los Angeles Daily J.*, Aug. 26, 1998, also published in *Litigation News*, Winter 1998, at 7 (op-ed)

Review of *Science on Trial*, *Litigation News*, Spring 1997, at 4

Good Science Wins a Victory in the Courtroom, *Charlotte Observer*, Jan. 24, 1997, at 13A (also published in several other newspapers) (op-ed)

Hauling Junk Science Out of the Courtroom, *Wall St. J.*, July 14, 1993, at A16 (op-ed)

Junk Science in the Courtroom, *Wall St. J.*, March 24, 1993, at A15 (op-ed)

Why Johnny Can't Pray, *Reason*, Feb. 1992, at 56

Exclusionary Rule: Something's Not Kosher About Davis-Bacon, *Reason*, Aug./Sept. 1991, at 32

Blocking the Lights, *Reason*, Nov. 1990, at 40

Regulating What Children Watch, *Liberty*, Jan. 1990, at 63



## PROFESSIONAL SERVICE

**Academic Referee:** *American Journal of Legal History*, Cambridge University Press, *Columbia Law Review*, *Harvard Law Review*, *Independent Review*, *Journal of American History*, *Jurimetrics*, *Law and History Review*, *Law and Social Inquiry*, *Law and Society Review*, Oxford University Press, *Supreme Court Economic Review*, *Yale Law Journal*, Yale University Press, among others.

### **AALS Section on Evidence**

Chair, 2005; Chair-elect, 2004; Secretary 2003

### ***Cato Supreme Court Review***

Board of Editors, 2003-present

### ***George Mason University School of Law***

Annual committee service, including seven-time chair of the appointments committee

## EDUCATION

### **Yale Law School**

J.D. 1991

Senior Editor, *Yale Law Journal*

John M. Olin Fellow in Law, Economics, and Public Policy

Lambe Fellow, Institute for Humane Studies

### **Brandeis University**

B.A. *Summa cum laude* (History) 1988

Phi Beta Kappa